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NO. 82-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

STEERE TANK LINES, INC.,

Petitioner

v.

INTERSTATE COMMERCE COMMISSION

AND

UNITED STATES OF AMERICA,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1.

Whether the court of appeals has been so chilled by the Supreme Court's stay of mandamus order issued March 29, 1982 in No. 82-86, *Interstate Commerce Commission* v. *American Trucking Associations, Inc. et al,* as to violate precedent by affirming Commission action on a basis in law totally different to the basis found in the Commission decision below.

2.

Whether the new standard formulated by the court of appeals for determining if applicant has established its *prima facie* case on public need improperly violates and nullifies the standard utilized for over 40 years by the Commission and re-enacted by Congress in the Motor Carrier Act of 1980.

3.

Whether evidence of the character of existing authorized common carrier service is material evidence in an application for a new Certificate of Public Convenience and Necessity under the Motor Carrier Act of 1980.

4.

Whether the mere anticipation of possible future use of a service, without more, proves public need for that service.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	10
I. BACKGROUND	10
A. Case Law Development Prior to the Motor Carrier Act of 1980	10
B. The Effect of the Motor Carrier Act of 1980 Upon New Certificate Entry Standards	14
II. THE DECISION OF THE COURT OF APPEALS	18
A. The Court of Appeals Did Not Uphold the Commission Upon the Same Basis Articulated in the Commission's Order	18
B. The Decision Below Undermines the Entire Regulatory Scheme of the Motor Carrier Act of 1980	20
CONCLUSION	25
CERTIFICATE OF SERVICE	26
APPENDICES A-G	

TABLE OF AUTHORITIES

Cases:	Page
Airport Shuttle Service, Inc. v. I.C.C., 676 F.2d 836	12
Alamo Express, Inc. v. I.C.C., 673 F.2d 852	20
American Trucking Association, Inc. v. I.C.C., 659 F.2d 452	16
American Trucking Association, Inc. v. I.C.C., 682 F.2d 487	20
American Trucking Association, Inc. v. I.C.C., 688 F.2d 1337	20
Assure Competitive Transportation, Inc. v. I.C.C., 629 F.2d 467	13
Assure Competitive Transportation, Inc. v. I.C.C., 635 F.2d 1301	13
Bowman Transportation, Inc. v. Arkansas Best Freight System, Inc., 419 U.S. 281, 95 S.Ct. 438	10
Brown Express, Inc. v. United States, 607 F.2d 695, 701	19
Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168-169, 83 S.Ct. 239, 245-50	19
Chemehuevi Tribe of Indians v. Federal Power Commission, 420 U.S. 395, 95 S.Ct. 1066	18
Coastal Tank Lines, Inc. v. I.C.C., 690 F.2d 537	20
Containerfreight Corp. v. U.S., 685 F.2d 329	20
Dean Truck Lines, Inc. v. I.C.C., 688 F.2d 254	20
F.C.C. v. RCA Communications, Inc., 346 U.S. 86, 93, 73 S.Ct. 998, 1003	16
Federal Power Commission v. Texaco, Inc., 417 U.S. 380, 397, 94 S.Ct. 2315, 2326	19

TABLE OF AUTHORITIES — (Continued)

Cases:	Page
Interstate Commerce Commission v. Steere Tank Lines, Inc., et al., No. 82-41	9
May Trucking Co. v. U.S., 593 F.2d 1349	11, 12
Morgan v. U.S., 304 U.S. 1, 18, 58 S.Ct. 773, 776	23
Port Norris Exp. Co., Inc. v. I.C.C., 687 F.2d 803	20
Provost Cartage, Inc. v. I.C.C., 686 F.2d 221	20
Refrigerated Transport, Inc. v. I.C.C., 673 F.2d 1196	20
Refrigerated Transport, Inc. v. I.C.C., 686 F.2d 881	20
J.H. Rose Truck Lines, Inc. v. I.C.C., 683 F.2d 943	20
J.H. Rose Truck Lines, Inc. v. I.C.C., 683 F.2d 952	20
Sawyer Transport, Inc. v. U.S., 565 F.2d 474	11
Securities and Exchange Commission v. Chenery Corp., 332 U.S. 194, 195, 67 S.Ct. 1575, 1577	19
Steere Tank Lines, Inc. v. I.C.C., 675 F.2d 103	20
Steere Tank Lines, Inc. v. I.C.C., 675 F.2d 763	20
P.C. White Truck Line, Inc. v. I.C.C., 551 F.2d 1326	11

Administrative Decisions:

C & O Railway Co. Extension — West Virginia, MC-109867 (Sub 4), 9 Fed. Car. Cs. Para 32, 772	17
Paul S. Crebs Extension, 24 M.C.C. 16	17
Dorr, Extension — Lumber, 49 M.C.C. 561	17
Roger A. Etzler, Extension — Canned Goods, MC-26970 (Sub 13), 5 Fed.Car.Cs Para. 31,115.01	14

TABLE OF AUTHORITIES — (Continued)

Administrative Decisions: **Page**

Ex Parte No. 55 (Sub-No. 43) Rules Governing Applications for Operating Authority, 364 I.C.C. 508, 575-576 24

Ex Parte MC-121, Policy Statement on Motor Carrier Regulation, 44 F.R. 60296 ..... 12, 13

Fernstrom Storage and Van Co. Ext.-Nationwide Service, 110 M.C.C. 452 17

Groendyke Transport, Inc. Extension - Etter, MC-111401 (Sub 12), 8 Fed. Car. Cs. Para. 32,147 17

Hughes Transportation, Inc., Extension - Interchange Points, 64 M.C.C. 46, 67 M.C.C. 235 21

Jensen Extension - Corn Syrup, 54 M.C.C. 271 17

Liberty Trucking Co. Ext.-General Commodities, 130 M.C.C. 243 17

Mercer & Dunbar, Inc. Common Carrier Application, 13 M.C.C. 683 17

Mistletoe Express Service Extension - Texas, MC-42405 (Sub 3), 9 Fed. Car. Cs. Para. 32,793 17

Pan-American Bus Lines Operation, 1 M.C.C. 190, 203 ..... 12, 14

Pre-Fab Transit Company, Extension - Nationwide General Commodities, 132 M.C.C. 409, 411 ..... 7, 17

Trans-American Van Service, Inc. Common Carrier Application, MC-22254, 4 Fed. Car. Cs., Para. 30,726 21

Tri-State Motor Transit Co. Ext. - General Commodities, 132 M.C.C. 504, 513 15

TABLE OF AUTHORITIES — (Continued)

Statutes:	Page
5 U.S.C. 553	19
49 Stat. 543	11
Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 and pertinent sections thereof as codified	*Passim*
28 U.S.C. 1254(1) and 1651(a)	2

Legislative Materials:

H.R. Rep. No. 96-1069, 96th Cong., 2d Sess., reprinted in 1980 U.S. Code Cong. & Ad. News, 2283	*Passim*

Miscellaneous:

K.C. Davis, "The Need for Confrontation," *Administrative Law Treatise*, Section 7.05, West Publishing Co. (1958) and Section 12.1, Administrative Law Treatise, Second Edition, K. C. Davis, K. C. Davis Pub. Co. (1979)	24

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OPINIONS BELOW

The June 10, 1981 decision of Review Board Number 2 of the Interstate Commerce Commission granting the application of Petroleum Transport, Inc. was served June 24, 1981. (Appendix A, 1a-3a) The administrative appeal of protestant Steere Tank Lines, Inc. was denied by the August 28, 1981 decision of Division 2 of the Commission, served September 2, 1981. (Appendix B, 4a-5a) The discretionary appeal to the Commission filed by protestant Steere Tank Lines, Inc. was denied by the October 19, 1981 decision of the entire Commission, served October 30, 1981. (Appendix

C, 6a) The Certificate of Public Convenience and Necessity granted by the Commission was served January 27, 1982. (Appendix D, 7a-8a) None of these decisions is reported.

Decision of the court of appeals on review affirmed the action of the Commission on September 27, 1982. This decision is reported at 687 F.2d 104. (Appendix E, 9a-16a)

Time for filing a Petition for Writ of Certiorari was extended to January 17, 1983 by Order of Justice Byron R. White. (Appendix F, 17a)

JURISDICTION

The Court's jurisdiction is invoked under 28 U.S.C. 1254(1) and 1651(a).

STATUTES INVOLVED

Pertinent provisions of the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (49 U.S.C. 10101, *et seq.*) are set forth in Appendix G, 18a-23a.

STATEMENT OF THE CASE

By application filed with the Interstate Commerce Commission January 30, 1981 under the "new certificate" provisions of the Motor Carrier Act of 1980,[1] Petroleum Transport, Inc. sought an initial Certificate of Public Convenience and Necessity authorizing transportation of *petroleum* and *petroleum products*, between points in Texas and New Mexico. In accordance with the contemporaneous regulations of the Commission, Petroleum Transport filed all its opening evidence with its application, this being in the form

[1] 49 U.S.C. 10922(b)(1), Appendix G (20a-21a, 23a).

of a verified statement from the applicant's President (G.M. "Buddy" Forbess) and four Commission forms entitled "Verified Certification of Shipper or Witness Support." No oral hearing was ever held, all evidence being presented in writing.

The four shipper Verified Certifications constituted the support testimony intended to establish the required showing "that the service proposed will serve a useful public purpose, responsive to a public demand or need." These were from representatives of Pride Refining, Inc. of Abilene, Texas; Farmland Industries of Amarillo, Texas; Goodpasture, Inc. of Brownfield, Texas; and Benton Oil Company of Lubbock, Texas.

The witness on behalf of Benton Oil Company was the same G.M. "Buddy" Forbess, President of Petroleum Transport and also President of Benton Oil Company. As witness for applicant, Mr. Forbess made no service proposal of a distinctive nature, did not suggest any service innovations and did not make a service proposal which would serve any particular "useful public purpose."

The witnesses of Farmland Industries and Pride Refining Company specifically declined to give any factual information relative to the character of presently available authorized common carrier service or to offer any reason why the availability of the proposed service would serve any useful purpose and be responsive to their needs, if indeed it would be. Each indicated it had traffic within the scope of the application and anticipated that it "would use" applicant if applicant were awarded a Certificate.

The Goodpasture witness, Robert Wilks, indicated that company ships fertilizer within the geographical scope of the application and needs common carrier service by some carrier

because Goodpasture's company trucks could not handle all its own traffic during the busy season. There is no representation as to the character of existing common carrier service. Mr. Wilks anticipated Goodpasture "would use" applicant's service if authorized.

As a member of the shipping public, G.M. "Buddy" Forbess (as President of Benton Oil Company) is a Phillips Petroleum distributor who ships petroleum products in his own company trucks within the geographical scope of the application. He testified Benton Oil uses the services of protestant Steere Tank Lines and that Steere's "service tends to be non-responsive." Shipments have to be scheduled in advance because of difficulty in getting trucks, according to Mr. Forbess.

Mr. Forbess is the only witness supporting the application who describes existing common carrier service in any way.

Inadequacy of existing service is suggested only by the Forbess testimony and seasonality of shipper traffic is mentioned only in the Wilks testimony, the latter not reflecting any problem in securing common carrier service — merely prompting use of it.

The testimony in opposition offered by the Steere witness along with Steere's protest to the application flatly denies the Forbess characterization of Steere service, further insisting Benton Oil rarely offers any traffic to Steere. Mr. Wilks leases a truck to Mr. Forbess which could be used by Mr. Forbess under the sought authority resulting in income as a trucker to Mr. Wilks. Steere, throughout the proceeding before the Commission, requested oral hearing with cross-examination of both these witnesses because of their obvious monetary interest in the grant of authority as truckers as distinguished from any need for common carrier service as

members of the shipping public. The veracity of the Forbess testimony was challenged and the dispute over material facts emphasized.[3]

The Steere witness further testified as to its authority, tank trucks, terminals and employees enabling it satisfactorily to perform all service which might be needed by the supporting shippers. It denied any inadequacy in its service and showed the Commission that those supporting the application established absolutely no useful public purpose to be derived from the proposed service and certainly no need for it.

The initial decision was rendered by Review Board Number 2, an employee board of the Commission. The application was granted with the ultimate statutory conclusion that applicant's "proposed operation will serve a useful public purpose, responsive to a public demand or need."[4] This ultimate conclusion was squarely based upon an evaluation of the evidence which led the Board "to conclude that presently available carriers, including sole protestant Steere, cannot satisfy shippers' complete transportation requirements."[4] That conclusion is the precise and *only* stated reason for the holding of successful establishment of public need for the proposed service. The factual finding upon which this conclusion is based is clearly stated in the immediately preceding sentence of the decision; i.e., shippers' claim "that present service and equipment levels are inadequate, particularly during peak production and shipping periods — hence their support for applicant here." Steere's

[3]No issue as to the procedural manner in which oral hearing was requested is involved.

[4]Appendix A (2a).

[4]Ibid.

request for oral hearing and cross-examination was denied because of "no material matters of fact xx in dispute."[6]

Steere timely filed its administrative appeal of right excepting to the Board refusal to allow oral hearing and cross-examination, requesting reopening of the record for oral hearing and cross-examination of Mr. Forbess and Mr. Wilks. Steere specifically challenged the conclusion the public would benefit from the grant.

Division 2 of the Commission denied Steere's administrative appeal commenting only on the oral hearing request. The Division reiterated the conclusion that no *material* facts were in dispute.[8] Steere thereupon filed its discretionary appeal to the Commission urging material facts to be in dispute as evidenced by the very decision of the Review Board on its face. Oral hearing for cross-examination was again requested, Steere still challenging the veracity of the testimony upon which the grant was based. The entire Commission denied this appeal without comment.[7]

Thus the final conclusion of the entire Commission was that applicant had established its threshold case of showing "that the service proposed will serve a useful public purpose, responsive to a public demand or need"[8] by proving to the Commission's satisfaction (albeit strongly contradicted) that "presently available carriers, including sole protestant Steere, cannot satisfy shippers' complete transportation requirements."[9]

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[6]Ibid.
[8]Appendix B (4a).
[7]Appendix C (6a).
[8]49 U.S.C. 10922(b)1(B).
[9]Appendix A (2a).

Petition for Review pursuant to 28 U.S.C. 2321, 28 U.S.C. 2341, *et seq.*, 5 U.S.C. 704 and Rule 15, *et seq.*, F.R.A.P. was timely filed by Steere in the court of appeals. The decision of the Commission as to applicant's threshold case being squarely based upon the finding of inadequate present service, that matter being strongly disputed by the parties and the Commission having ruled no dispute of material facts, thus no oral hearing, the principal issued raised in the court of appeals centered upon failure of applicant to establish its *prima facie* case as to useful public purpose.

The court of appeals correctly ruled an applicant must first show its proposed service "will serve a useful public purpose, responsive to a public demand or need" before any burden of proof shifts to a protestant.[10] The other two "new certificate" entry tests under the Motor Carrier Act of 1980[11] were disposed of quickly and are not raised again here.

The court of appeals decision correctly notes that only the testimony of Mr. Forbess supports the finding of inadequacy made by the Review Board and sustained by the entire Commission.[12] It considers the emphasis in the Commission decision upon "inadequacy of existing common carrier services rather than on the usefulness of the proposed new service" to be "unfortunate."[13]

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[10]Accord: "The statute puts the burden on the proponent to provide the Commission, at a minimum, with information which, if not rebutted, is sufficent to meet the statutory criterion of useful public purpose." *Pre-Fab Transit Company, Extension — Nationwide General Commodities*, 132 M.C.C. 409, 411, (Entire Commission, Jan. 9, 1981). See also H.R. Rep. No. 96-1069, 96th Cong., 2d Sess. 14, reprinted in 1980 U.S. Code Cong. & Ad. News, 2283, 2296.

[11]These are (1) applicants' burden to prove its own fitness, willingness and ability (49 U.S.C. 10922(b)(1)(A)) and (2) prostestants' burden of proving inconsistency with the public convenience and necessity (49 U.S.C. 10922(b)(1)) after applicant establishes its threshold case.

[12]Appendix E (14a).

[13]Appendix E (13a-14a).

Deciding the inadequacy testimony of Mr. Forbess was immaterial, thus accepting the *post hoc* rationalization of appellate counsel on brief (as opposed to the actual decision of the entire Commission), the court announced a totally new and unprecedented test by which "useful public purpose, responsive to a public need or demand" is to be measured.

The test is very succinctly stated as:

> "But the issue in this case is *not* whether present service is inadequate xxx but rather merely whether shippers 'would use' the new service."[14]

No precedent is cited for this test of "useful public purpose" other than the House Report issued in connection with the new legislation.[15] The test is not to be found in the Commission decisions below. It derives from the brief presented to the court of appeals by the General Counsel of the Commission, particularly counsel's defense of the Commission's refusal to grant oral hearing on the sole ground of "no material facts in dispute."[16]

Commission appellate counsel did not cite any precedent for the "would use" test. The idea evidently germinated in the Office of the General Counsel and is stated in the following curious argument at Page 21 of counsel's brief:

> "As Steere acknowledges (Br. 21), the Commission relied on the shippers' statements that they desired PT's

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[14]Appendix E (15a).

[15]H.R. Rep. 96-1069, *supra*.

[16]Appendix B (4a). The court's action, being unprecedented, raises the question of whether the court of appeals has been so thoroughly chilled by the Supreme Court's stay of mandamus order of March 29, 1982 in *Interstate Commerce Commission* v. *American Trucking Associations, Inc.* No. 82-86, still pending, as to unwittingly utilize improper methods to avoid further controversy with the Commission.

service because they had to arrange for common carrier equipment too long in advance or did not own enough trucks to carry their shipments during the busy season as evidence of need for PT's service. That reliance, however, did not render the issue of whether existing carriers could or would provide more service material to the decision. The shippers' statements that they desired PT's service and would use it was sufficient evidence of need for that service."

Essentially, then, the agency in reaching its decision relied upon evidence the veracity of which was severely challenged and then, to avoid the challenge, determined by the agency (and later the court of appeals) not to be material. Needing some different test which the *remaining* evidence would meet, the Commission counsel invented the "would use" test adopted by the court of appeals.

Neither the agency's appellate counsel nor the court of appeals cites any decisional precedent for the "would use" test.

Because the nature of the applicant's threshold case is at the heart of the multiplied thousands of "new certificate" entry applications being processed by the Commission pursuant to the Motor Carrier Act of 1980; because no other case is before the court involving such "new certificate" applications; because the Commission itself is seeking guidance from this court on its processing of the companion, but less vital, "restriction removal" applications pursuant to the Motor Carrier Act of 1980;[17] and because this court has not spoken directly on the law governing entry into regu-

[17] *Interstate Commerce Commission v. Steere Tank Lines, Inc., et al.*, No. 82-41, October Term, 1982, pending on Petition for Writ of Certiorari.

lated common carriage of property in the past eight years during which period considerable upheaval has occurred in this industry, it is imperative to petitioner, to motor carriers in general and to the shipping public that the court instruct the Commission on the limits within which it may act in promoting competition in the trucking industry.

REASONS FOR GRANTING THE PETITION

I.

BACKGROUND

A.

Case Law Development Prior to the Motor Carrier Act of 1980

The definitive departure point in the trend of giving more consideration to the value of competition (as opposed to legal sanction) in securing ever-improving motor carrier services for the public was the court's 1974 decision in *Bowman Transportation, Inc. v. Arkansas Best Freight System, Inc.*, 419 U.S. 281, 95 S.Ct. 438. There the court sustained the Commission in its conclusion that the added competition provided by the infusion of new carriers into the marketplace was a valid means of securing better service for the public. Competition which aids in the achievement of the objectives of the national transportation policy is in the public interest. But this assumes, first, competitive service has been sought as a goad for achieving public benefit and that the evidence in a particular record supports a conclusion such a result may reasonably be anticipated. Competition merely as an abstract ideal, a viable substitute for regulatory entry control, was not embraced by the court in *Bowman*.

With encouragement from the Bowman decision, the Commission embarked upon an ever-intensifying policy embracing eased entry.

Momentum was added by several court of appeals decisions indicating the courts' view that the Commission *should* affirmatively consider the value of competition.[18] The undergirding of the policy favoring increased emphasis upon the value of competition was, however, clearly the belief that a competitive goad would result in less lethargy among existing carriers and increased effort on the part of all carriers to provide the best possible service for the public benefit. Thus the thought germinated — an applicant should not be required *always* to prove existing common carrier service patently inadequate and, failing that, always to be denied a Certificate. It might be enough for applicant to show he has proposed something better even though existing service is "good enough"; the benefits of competition should not be ignored if raised by the record. Perhaps the motor carrier industry had become too stabilized and was in danger of becoming a sleeping giant unresponsive to public need for service — so argued some.

Entry provisions of the Motor Carrier Act of 1935[19] required an applicant for a Certificate of Public Convenience and Necessity to prove its proposal to be "required

[18] *P.C. White Truck Line, Inc. v. I.C.C.*, 551 F.2d 1326 (1977); *Sawyer Transport, Inc. v. U.S.*, 565 F.2d 474 (1977). In a much relied upon court of appeals decision just prior to July 1, 1980, the court affirmed the Commission conclusion applicant *had* established a need for improved new service and succeeded in showing *inadequacy* of existing services. Its language on the extent to which competition might be allowed adversely to affect existing carriers was the most extreme to that date, however. *May Trucking Co. v. U.S.*, 593 F.2d 1349 (1979).

[19] 49 Stat. 543.

by the present or future public convenience and necessity."[20] The tests whereby the statutory requirement might be met were soon formulated by the Commission and announced in *Pan-American Bus Lines Operation*, 1 M.C.C. 190, 203 (1936). These criteria are:

> xx [W]hether the new operation or service will serve a useful public purpose, responsive to a public demand or need; whether this purpose can and will be served as well by existing carriers; and whether it can be served by applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest."

This test, with some variation of emphasis on one or another factor, stood for over four decades.[21]

Now, in September, 1979, noting the remand in *P.C. White*, *supra*, and encouraged by its recent success in *May*, *supra*, in defending its increasing emphasis on competition in the marketplace as the arbiter rather than its own regulatory power, the Commission issued its decision in Ex Parte No. MC-121, *Policy Statement on Motor Carrier Regulation*[22] expressing its conviction the motor carrier industry:

> "is generally financially strong, that many segments of the industry have largely 'competitive characteristics and are capable of being regulated primarily by the economic forces of the market place, and that the artificial protections which strict government regulations of entry can provide are currently unnecessary in those instances'."

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[20]Former 49 U.S.C. 307.

[21]*Airport Shuttle Service, Inc. v. I.C.C.*, 676 F.2d 836 and cases cited at 676 F.2d 840.

[22]44 F.R. 60296 (1979).

The substantive holding of Ex Parte No. MC-121 was to eliminate the second *Pan American* criterion and to make clear that the primary burden under the third criterion falls upon the persons opposing a grant. In so doing, however, the Commission did not eliminate the first criterion, and it did expressly hold the burden of proving the first criterion to be upon applicant.

Two court of appeals decisions tie directly to Ex Parte No. MC-121, the first dealing with review of Commission adjudication leading into the policy statement [23] and the second a direct review of the policy statement.[24]

In both decisions the reviewing court squarely held the burden to demonstrate a public need for the proposed new services lies upon the applicant. The second decision affirms Ex Parte No. MC-121 and in doing so holds the "elimination of attention to the adequacy of existing service *as an independent policy factor* does not violate existing case law but rather conforms to the mandate of this and other courts that the Commission *consider the benefit of additional competition to the public, despite the adequacy of existing service.*" (emphasis supplied)[25]

And the court further held:

> "Moreover, applicants must still demonstrate a public need for the service."[26]

Certiorari was not sought by the parties in this second proceeding. The Supreme Court has not validated a tossing

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[23] *Assure Competitive Transportation, Inc. v. U.S.*, 629 F.2d 467 (CA 7, Aug. 7, 1980), cert. denied Jan. 26, 1981.

[24] *Assure Competitive Transportation, Inc. v. U.S.*, 635 F.2d 1301 (CA-7, Dec. 30, 1980).

[25] 635 F.2d 1306.

[26] Ibid.

aside of any part of the test of public convenience and necessity which has existed for more than four decades and the reviewing court of appeals in *Assure Competitive Transportation, supra,* did *not* hold the character of existing service to be immaterial under the revised criterion announced in Ex Parte No. MC-121.

B.

The Effect of the Motor Carrier Act of 1980 Upon New Certificate Entry Standards

Congress reworded the "new certificate" entry provisions when it enacted the Motor Carrier Act of 1980, effective July 1, 1980.[27]

The applicant's threshold case requires it to prove, as here pertinent, "on the basis of evidence presented by persons supporting the issuance of the certificate, that the service proposed will serve a useful public purpose, responsive to a public demand or need."[28]

Congress thereby adopted the *exact* language of the first *Pan American* criterion, created by the Commission itself in 1936 and used consistently since that time, as the test to be applied first in deciding whether an application for a motor carrier of property Certificate of Public Convenience and Necessity should be granted.

Even where an application is uncontested the applicant must meet "his *prima facie* showing of public need"[29] and

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[27]Appendix G (23a).

[28]Ibid.

[29]H.R. Rep. 96-1069, *supra,* p. 15; *Roger A. Etzler, Extension — Canned Goods,* MC-26970 (Sub 13) (1946), 5 Fed. Car. Ca. Para. 31,115.01.

that is to be accomplished under the *same* test first announced in 1936.

Congress noted ways in which an applicant might attempt to establish its threshold case. Such factors include "need or demand for *new* services, innovative quality or price options, increased competition, greater fuel efficiency, improved service for small communities, improved opportunities for minorities, and any other benefits that would serve a useful public purpose."[30] (emphasis supplied) The Commission also has left the door open[31] for applicants to propose a "better mousetrap" in any way their inventiveness can conceive — but actual useful public purpose must be established by proof. Economic theories, political philosophies, shippers' whims, profit to one entity at the expense of another and the like do not meet the test.

The public purpose of competition is fully recognized by Congress for it notes:

> "The Act will also serve as a constructive stimulus to existing carriers to improve service and meet the changing requirements of shippers and receivers."[32]

There is no indication in this Congressional action (as well as in the decisions of the various courts) that increased competition, as an abstraction unrelated to a factual showing in the application record, has any place in the legitimate threshold showing an applicant must make.

Nor does the Motor Carrier Act of 1980 lend any credence to a theory that the mere cloning of the existing service by an endless procession of additional carriers (each providing

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[30] Id. Only "new services" or "increased competition" can be considered pertinent in any way in this proceeding.

[31] *Tri-State Motor Transit Co. Ext. — General Commodities*, 132 M.C.C. 504, 513 (1981).

[32] H.R. Rep. 96-1069, *supra*, p. 14.

identical transportation) serves any useful public purpose. The very fact Congress saw fit to continue entry control contradicts the notion that national policy unqualifiedly favors competition.[33]

That an applicant may properly seek to establish his proposal for a *new* or better service (and present testimony from shippers who claim a *need* for that *new* service) as furthering a useful public purpose is beyond cavil.

On the other hand, if applicant proposes nothing innovative — merely more of the same service — and increased competition is the only result of a grant, applicant must show the more intensive competition would be beneficial to the public — likely to result in needed better service — and not mere destructive competition which would be contrary to national policy.[34]

In either event, the character of existing service is manifestly a material consideration for it provides the standard against which applicant's proposal is to be measured. Proof that existing service is usable may not defeat a proposal to improve service under the test (for a 20-mule-team wagon train might be usable), but to rule the character of existing service immaterial is to negate any possibility of determining whether applicant's proposed service would be better or, may be, even less desirable.

The most effective way to show an applicant's proposed service would be beneficial and would serve a useful public purpose is through the testimony of shippers having traffic within the territorial and commodity scope of the applica-

[33] *F.C.C. v. RCA Communications, Inc.*, 346 U.S. 86, 93, 73 S.Ct. 998, 1003 (1953); *American Trucking Associations, Inc. v. I.C.C.*, 659 F.2d 452.

[34] 49 U.S.C. 10101(a)(2)(3)(4)(6) and (7)(D) and (F).

tion.[35] Their mere appearance as witnesses, however, proves nothing. The new Act does not contemplate a popularity poll for new entrants who propose a service identical to that already available.

On the contrary, the purpose of their testimony is — once having qualified themselves as having a legitimate and representative interest in the proposed service — to show *how* it would be beneficial and *why* its availability would serve a useful public purpose.[36] Stated simply, they should testify applicant does indeed have something better to offer which, if available, would benefit them in some identifiable way.[37] This is the historical first test of *Pan American* which was re-enacted verbatim by Congress in the Motor Carrier Act of 1980.

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[35]H.R. Rep. 96-1069, *supra*. p. 14.

[36]"***, [S]hipper supported applications should provide sufficient information for us to determine the basic nature of the public's transportation needs or demands of which their supporting shippers' statements are representative." *Pre-Fab Transit Company, supra*, 132 M.C.C. 413 (1981).

[37]For example: new armored truck service needed, *Mercer & Dunbar, Inc. Common Carrier Application*, 13 M.C.C. 683 (1939); truck service in addition to rail service needed to move uncrated furniture, *Paul S. Crebs Extension*, 24 M.C.C. 16 (1940); needed improvement of rail less-than-carload service by use of trucks, *C & O Railway Co. Extension — West Virginia*, MC-109867 (Sub 4)(1953), 9 Fed. Car. Ca. Para. 32,772; call-on-demand service needed in addition to scheduled service, *Jensen Extension-Corn Syrup*, 54 M.C.C. 271 (1952); need for express service providing greater care, security and speed-in-transit than ordinary freight service, *Mistletoe Express Service, Extension-Texas*, MC-42405 (Sub 3)(1953); 9 Fed. Car. Ca. Para. 32,793;need for new single-line service to eliminate transfer of lumber from one truck to another, *Dorr, Extension-Lumber*, 49 M.C.C. 561 (1949); need for pressure vessel tank trucks to facilitate developing distribution of anhydrous ammonia, *Groendyke Transport, Inc. Extension — Etter*, MC-111401 (Sub 12)(1951), 8 Fed. Car. Ca. Para. 32,147; improved household goods service needed in view of increased population mobility, *Fernstrom Storage and Van Co. Ext.-Nationwide Service*, 110 M.C.C. 452 (1969); need shown for improved regular route service, *Liberty Trucking Co. Ext.-General Commodities*, 130 M.C.C. 243 (1978).

Re-enactment by Congress of a long-established agency standard is not to be treated lightly by a reviewing court.[38]

II.

THE DECISION OF THE COURT OF APPEALS

A.

The Court of Appeals Did Not Uphold the Commission Upon the Same Basis Articulated in the Commission's Order

The Commission in its decisions below did not base its conclusion that applicant had established its *prima facie* case of public need on a proposal for innovative quality or price options or a new or different service. It did not base its decision on improved service for small communities or better opportunities for minorities. Greater fuel efficiency was neither proposed nor found.[39]

The Commission based its conclusion squarely on alleged inadequacy in present service and equipment levels.

Need shown by the record, in the view of the Commission, was precisely "for applicant's supplemental equipment and service."[40] The Commission *did* find present service inadequate and that was the only basis for its decision which was articulated in the order.

The court of appeals, on the contrary, based its conclusion a useful public purpose had been shown upon *other* testi-

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[38]*Chemehuevi Tribe of Indians v. Federal Power Commission*, 420 U.S. 395, 95 S.Ct. 1066.

[39]*Supra*, p.

[40]Appendix A (2a).

mony having no pertinency to the public need testimony relied upon by the Commission. Creating the "would use" test,[14] the court of appeals substituted a new and vastly different basis for concluding applicant had passed its threshold test.

In selecting different evidence and announcing a new standard by which to determine the public need, the court of appeals not only went far beyond the bounds set by the Supreme Court for court review of agency action but also established a new norm so distinctive and binding as probably to have required notice and comment if promulgated by the agency itself.[42]

The "would use" test is not an agency-created standard affirmed by a reviewing court of appeals. It was patently borne by that court itself and *substituted* for the standard actually used by the agency.

But the Supreme Court has held "an agency's order must be upheld, if at all, 'on the same basis articulated in the order by the agency itself.' "[43]

The court should grant certiorari because hastily conceived judge-made substantative law affecting the rights of

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[41] *Supra*, p.

[42] 5 U.S.C. 553; *Brown Express, Inc. v. United States*, 607 F.2d 695, 701.

[43] *Federal Power Commission v. Texaco, Inc.*, 417 U.S. 380, 397, 94 S.Ct. 2315, 2326; *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-169, 83 S.Ct. 239, 245-50. Accord: "If those [the agency's] grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency." *Securities and Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 196, 67 S.Ct. 1575, 1577.

literally thousands upon thousands of motor carriers and their multitudinous employees and customers and directing agency action at loggerheads with Congressional mandate demands control which can emanate only from this court. Congressional oversight[44] is no substitute for this court's review of agency and lower court implementation of the Motor Carrier Act of 1980. Failure of the court to act now can only result in growing controversy.[45]

B.

The Decision Below Undermines the Entire Regulatory Scheme of the Motor Carrier Act of 1980

By a too simplistic reading of one sentence in the legislative history of the Motor Carrier Act of 1980, the court of appeals shatters four decades of substantive law. The rationale of the decision relies solely upon:

> "The normal way to establish this has been for applicants to submit evidence of some of those who would use the service proposed."[46]

Congress by this language distinguished between types of witnesses first and, secondly, between types of supporting evidence.

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[44]Appendix G (19a).

[45]Commission implementation of the 1980 Act has resulted in at least the following review actions: *Steere Tank Lines, Inc., v. I.C.C.*, 675 F.2d 103; *Steere Tank Lines, Inc. v. I.C.C.*, 675 F.2d 763; *A.T.A. v. I.C.C.*, 682 F.2d 487; *Dean Truck Lines, Inc. v. I.C.C.*, 688 F.2d 254; *Provost Cartage, Inc. v. I.C.C.*, 686 F.2d 221; *J.H. Rose Truck Line, Inc. v. I.C.C.*, 683 F.2d 943; J.H. Rose Truck *Line, Inc. v. I.C.C.*, 683 F.2d 952; *Alamo Express, Inc. v. I.C.C.*, 673 F.2d 852; *Refrigerated Transport, Inc. v. I.C.C.*, 673 F.2d 1196; *A.T.A. v. I.C.C.*, 688 F.2d 1337; *Containerfreight Corp. v. U.S.*, 685 F.2d 329; *Coastal Tank Lines, Inc. v. I.C.C.*, 690 F.2d 537; *Refrigerated Transport, Inc. v. I.C.C.*, 686 F.2d 881; *Port Norris Exp. Co., Inc. v. I.C.C.*, 687 F.2d 803.

[46]H.R. Rep. 96-1069, *supra*, p. 14.

First, it noted that the term "persons supporting the issuance of the certificate"[47] is classified to include "public officials, shippers, receivers, trade associations, civic associations, consumers, and employee groups, as well as by the applicant itself."[48] Efforts to show public need by persons other than shippers or receivers of freight formerly were accorded little weight and usually challenged.[49] Thus Congress clarified the issue. Persons other than shippers and receivers are to be heard — but shippers and receivers are the preferred witnesses.

In addition, various types of supporting evidence are to be considered. The best witness is the person who tenders traffic and his testimony may relate to a number of factors such as: (1) need for new service or (2) improved service for small communities or (3) innovative price options. While that type evidence from that particular person "is still the most effective evidence"[50] it is not the *only* evidence from the *only* type witness which should now be considered.

Presumably, a representative of a minority association should be allowed to testify. His testimony would be of little value, however, if he testified no farther than to say: "I am a member of a minority group and I support the application." This would qualify him as a witness to be heard but would not prove that a grant would serve a useful public purpose. To be of any actual support, he would also need to show *why* he supports this particular applicant and *how* a grant would likely result in "improved opportunities for minorities."

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[47]Appendix G (23a).

[48]H.R. Rep. 96-1069, *supra*, p. 14.

[49]*Trans-American Van Service, Inc. Common Carrier Application*, MC-22254 (1944), 4 Fed. Car. Cs. Para. 30, 726; *Hughes Transportation, Inc., Extension-Interchange Point*, 64 M.C.C. 46, 67 M.C.C. 235 (1955, 1956).

[50]H.R. Rep. 96-1069, *supra*, p. 14.

Unfortunately the court of appeals mistakes the type of evidence for the type of witness. Those who "would use" the service are *in a position* to offer the most effective evidence but if they do not disclose the *reason* for their support — if they do not reveal why they support the application or show the proposed service would benefit them as representatives of the shipping public — they have not aided applicant in proving a "useful public purpose."

In referring to the "normal way to establish" public need Congress looked to the precedent of the past four decades. "Still the most effective evidence" is that type normally, typically, usually, historically relied upon by the Commission, shipper evidence which shows why applicant is needed.[51]

The court of appeals decision eliminates the need for any showing of the *reason* a shipper supports an applicant. Certainly those who support on the basis of availab'e traffic are the most effective witnesses, but their mere anticipation of a tender to applicant, if authorized, does not establish a useful public purpose.

By obviating the requirement that a shipper show why he supports an applicant, the court of appeals decision undermines the entire scheme of entry control by regulation. This record demonstrates why.

The same shippers whose testimony is relied upon by the Commission — but held to be immaterial — have a pecuniary interest in the grant distinct from any interest as a shipper. Had Mr. Wilks testified as a truck lessor he might have shown some useful public purpose such as saving fuel consumed by his truck when leased to applicant. He testified

[51]Explanation at footnote 37, *supra*.

only as a shipper, showing no advantage to his employer as a shipper, thus leaving the clear inference his support was secured by means not admitted by himself and thereby effectively concealing useful public purpose, if any.

The Farmland Industries and Pride Refining witnesses similarly show nothing in the way of a useful public purpose to be served, merely endorsing the duplication of existing service. The resulting increased competition might have been cited as offering some specific benefit to these two shippers if such were the case. Even this is not accomplished for no mention of expected benefits to be derived from competition will be found in their testimony.

The net effect of the decision is, therefore, the opening of the door to unlimited competition without any showing of public benefit. This could not have been the intention of Congress for had that been the goal, entry control would surely have been eliminated rather than re-enacted. If the marketplace were to be the arbiter through survival of the fittest rather than the Commission by rational judgment, the entry provisions would never have been passed.

Moreover, the record below shows how this decision undermines what little entry control remains at the Commission.

The Commission is now refusing to set any motor carrier of property entry application for oral hearing. The lengths to which it goes in refusing oral hearing and cross-examination is demonstrated by its decisions below. The knowledge that no application will be set for oral hearing and no shipper ever cross-examined inevitably leads to careless testimony.[52]

[52]The fundamental right to a hearing includes not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. See *Morgan v. U.S.*, 304 U.S. 1, 18, 58 S.Ct. 773, 776.

The elimination of any likely confrontation by existing carriers inexorably leads to careless statements by shippers philosophically inclined toward total freedom of entry.[53]

In the record below, the firm refutation of charges against Steere is disregarded entirely and the claims of Mr. Forbess accepted entirely thus completing the injustices begun by refusing Steere the right to confront its accuser.

The government form requiring only the filling in of blank spaces has replaced not only the oral testimony previously required but also the affidavit more recently used.[54]

Now applicant's representative may fill in the blank spaces and the effort required of the shipper is merely to sign the form — all the while being assured his anticipation of future use of the proposed service is not contractual in nature, merely anticipatory. Indeed, today the signing of the form may mean little more than a shipper wishing to get rid of a motor carrier salesman expeditiously.

Somewhat insulated from any probability of ever hearing of the matter again, the shipper has no compulsion toward veracity.[55]

Over against this reality now facing existing carriers opposing new authorizations, the court removes the last vestiges of entry control by eliminating any requirement for shippers to explain their *reasons* for desiring the proposed service. The result of the court of appeals decision may well be the public interest reduced to nothing more than the

[53]See "The Need for Confrontation," Section 7.05, *Administrative Law Treatise*, K. C. Davis, West Publishing Co. (1958) and Section 12.1, Administrative Law Treatise, Second Edition, K. C. Davis, Pub. Co. (1979)

[54]Ex Parte No. 55 (Sub-No. 43), *Rules Governing Applications for Operating Authority*, 364 I.C.C. 508, 575-576.

[55]While the form contains the usual prejury provisions, nothing is being done to enforce them.

nuisance quotient of a persistent trucker asking a shipper to sign a form.

That is the state of entry control today and only this court is in a position to return rationality to regulation.

CONCLUSION

Former Vice-Chairman Stafford of the Commission in his dissent in Ex Parte No. MC-121, *supra*, best described the continual self-deregulation perpetrated by the Commission in the past several years in these words:

> "Had all of these changes occurred in one proceeding, I am confident that any reviewing court would have found that they exceeded the bounds of what an agency may do toward self-deregulation. The tactic of smaller, individual rulemakings, each with a limited specific change, has proven very effective in achieving major changes without legislation. Unfortunately no reviewing court has had the big picture before it; and I doubt if any court ever will."

This case contains many elements of the big picture. It provides a clear-cut record, isolating the basic issues and gives the court an ideal vehicle through which to delineate the limits within which the Commission may actively promote competition among the motor carriers of property.

In the interest of a stable national transportation system, the court should grant certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of January, 1983, I have served true and accurate copies of the foregoing Petition for Certiorari on all parties of record by first-class mail, postage prepaid, as follows:

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